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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

FAIR POLITICAL PRACTICES COMMISSION, a state agency, Plaintiff, vs. AGUA CALIENTE BAND OF CAHUILLA INDIANS, a federally-recognized Indian tribe; and DOES I-XX, Defendants.	Civil case no. 02AS04545 REPLY MEMORANDUM OF POINTS AND AUTHORITIES OF SPECIALLY-APPEARING DEFENDANT AGUA CALIENTE BAND OF CAHUILLA INDIANS IN SUPPORT OF MOTION TO QUASH SERVICE FOR LACK OF PERSONAL JURISDICTION [C.C.P. §418.10] Hearing: January 8, 2003 2:00 p.m. Dept. 53 Honorable Loren E. McMaster

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I. A DEFINITION IN A STATE STATUTE DOES NOT OVERCOME A TRIBE'S SOVEREIGN IMMUNITY.

The FPPC argues that, because the Tribe is supposedly a "person" as defined by the Political Reform Act (the "Act"), Government Code §82047 (Opp., p. 8, lines 19-23), the Tribe 'is subject to regulation by the Act, notwithstanding its sovereign status." (Opp. p. 10, lines 3-4). The FPPC cites *FPPC v. Suitt*, 90 Cal.App.3d 125, 133 (1979), which holds that the California Legislature is a "person." Under this reasoning, the United States would also be a "person." Does the FPPC claim that the United States is subject to regulation by the Act, notwithstanding its sovereign status? Presumably not. *Suitt* notes "case law holding that public entities are included among 'persons' in statutory language *unless inclusion would infringe upon sovereign governmental powers.*"[1] One of the sovereign governmental powers of the Untied States is federal sovereign immunity, which applies to suits by states.[2] If the United States is not a "person" under the Act, neither is the Tribe, and for exactly the same reason: neither is subject to suit by the FPPC due to its sovereign immunity.

Just as King Canute's decree could not stop the rising tide, no unilateral definition by the California Legislature, no matter what its content, overcomes another sovereign's immunity from suit. Even if the Act declared that the United States and Tribe, by name, are subject to suit by the FPPC, that statement would not create jurisdiction for enforcement of the Act that did not otherwise exist. Instead, "As a matter of federal law, an Indian tribe is subject to suit *only* where Congress has authorized the suit or the tribe has waived its immunity."[3] No matter how ardently the California Legislature may wish to create such a waiver, *only* Congress or the Tribe may be

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[1] *Id.*, citing *City of Los Angeles v. City of San Fernando*, 14 Cal. 3d 199, 276 (1975), which holds that cities are "persons."

[2] *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991).

[3] *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998, emphasis. added)

the source of such a waiver. The California Legislature may not be a third such source, by definition or any other unilateral statement. As one District Court has held on this very point,

> . . . the only entities that can determine the extent to which the immunities and protection are afforded to tribes are Congress and the applicable tribes, themselves. The state legislatures have no such right.
>
> *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F.Supp.2d 1131, 1141 (N.D.Okla., 2001)

This conclusion reflects the general proposition that, under the Supremacy Clause of the U.S. Constitution, no California statute may limit or condition a federal right:

> While it may be completely appropriate for California to condition rights which grow out of local law and which are related to waivers of the sovereign immunity of the state and its public entities, California may not impair federally created rights or impose conditions on them. [cit.om.]
>
> *Williams v. Horvath*, 16 Cal.3d 834, 842 (1976)

II. EVEN IF THE FPPC COULD REGULATE THE TRIBE'S CONDUCT, IT CANNOT THEREBY OVERCOME THE TRIBE'S IMMUNITY FROM SUIT.

The primary and fatal flaw in the FPPC's opposition is that the FPPC fails to recognize a crucial distinction made by the U.S. Supreme Court between a state's right to regulate a tribe's conduct in the abstract, and the ability of that state to use formal legal action to enforce that right. The FPPC presumes that, if it has a substantive right to regulate the Tribe's conduct, then the FPPC necessarily has a right to enforce that regulation against the Tribe by direct judicial action. The U.S. Supreme Court has rejected this leap of faith several times recently when various plaintiffs, including tribes, have attempted to overcome a state's immunity from suit based in federal law, as well as when states have similarly attempted to overcome a tribe's immunity from suit, also based in federal law. Under the federalism enunciated recently by the U.S. Supreme Court, tribes and states often have substantive rights against the other, but must seek enforcement of those rights by means other than direct suit because of an immunity rooted in federal law.

A. Even if the FPPC may regulate the Tribe, the FPPC still cannot enforce that right judicially due to the Tribe's sovereign immunity.

In *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), the U.S. Supreme Court held that a state had the right to require individual Indians to endure the "minimal burden" of collecting and remitting state sales tax on their sales of cigarettes to non-Indians on a reservation so that such buyers would not escape *their* obligation to pay the tax. *Moe, supra,* 425 U.S. at 483 When the Potawatomi Tribe refused to comply with this "minimal burden," it sued the Oklahoma Tax Commission to enjoin an assessment, and the state agency counterclaimed against that tribe for the amount of the assessment. The U.S. Supreme Court relied on *Moe* and *Colville* to reaffirm the tribe's underlying liability for the state tax, but unanimously held that the tribe's sovereign immunity barred the counterclaim for the tax due, and repeated this distinction between rights and the means to enforce them as recently as 1998:

> In view of our conclusion with respect to sovereign immunity of the Tribe from suit by the State, Oklahoma complaints that, in effect, decisions such as *Moe* and *Colville* give them a right without any remedy. **There is no doubt that sovereign immunity bars the State from the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives.**
>
> *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991, emphasis added)

> We have recognized that a State may have the authority to tax or regulate tribal activities occurring within the State but outside Indian country. [cit.om.] To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In *Potawatomi,* for example, we affirmed that while Oklahoma may tax cigarette sales by a Tribe's store to non-members, the Tribe enjoys immunity from a suit to collect unpaid state taxes. [cit.om.] **There is a difference between the right to demand compliance with state laws and the means available to enforce them.** [cit.om.]
>
> *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 755 (1998, emphasis added)

So, too here. This result that a state may not be able to overcome tribal sovereign immunity to enforce a substantive right[4] of the state against a tribe is common in the federal system. In recent years, the same result has frequently played itself out, but exactly in reverse.

B. Those possessing a substantive right do not necessarily have a remedy that overcomes a state sovereign's immunity.

Although the Eleventh Amendment is not, per se, a doctrine of state sovereign immunity, it embodies a doctrine of federal law which has just the same effect:

> The ultimate guarantee of the Eleventh Amendment is that non-consenting States may not be sued by private individuals in federal court.
>
> *Board of Trustees of University of Alabama v. Garrett,* 531 U.S. 356, 363 (2001)

Thus, even when Congress expressly wishes to subject states to suit by private individuals, it may not do so based solely on a power in Article I of the U.S. Constitution. To overcome Eleventh Amendment immunity to permit such individual actions, further Constitutional authority is necessary, such as the authorization for "appropriate legislation" to implement the Fourteenth Amendment. See *Kimel v. Florida Board of Regents,* 528 U.S. 62, 80-82 (2000).

The progenitor of this doctrine is *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), in which Congress had expressly authorized Indian tribes to sue states which did not negotiate in good faith with them under the Indian Gaming Regulatory Act, 25 U.S.C. §2701, et seq. The U.S. Supreme Court held that, even though Congress clearly expressed its desire to permit such suits, Congress lacked the power to overcome the Eleventh Amendment immunity of states, thus leaving tribes with a right, but no remedy by suit, against recalcitrant states. Under this doctrine, the U.S. Supreme Court has upheld states' Eleventh Amendment immunity against express Congressional authorizations for private actions against states to enforce the Americans

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[4] The Tribe denies that the FPPC has such a substantive right, but assumes it for this argument.

with Disabilities Act,[5] the Age Discrimination in Employment Act,[6] a primary statutory amendment to the patent laws,[7] and the Fair Labor Standards Act against those states.[8]

In each of these cases, despite the clear and express desire of Congress to permit individuals or tribes to sue states, the Eleventh Amendment barred the action. The plaintiffs had to seek other remedies to vindicate their federal rights against the defendant states. In each of these cases, the imperative of state immunity, as embodied in the Eleventh Amendment, overcame *all* other interests, no matter how compelling.

This distinction, between the existence of rights against a sovereign, and the lack a waiver of that sovereign's immunity for enforcement by judicial means, finds further support in the U.S. Supreme Court's fullest discussion of the relation between state and tribal sovereigns under the U.S. Constitution. After holding that "Indian tribes are sovereigns" in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 780 (1991), and that both states and tribes are "domestic" sovereigns (*Id.*, at 782), the U.S. Supreme Court rejected a claim "that the States waived their immunity against Indian tribes when they adopted the Constitution." *Id.*, at 781 States waived their immunity as to suits by other states in the "plan of the [Constitutional] convention" (*Id.*, at 779) because "the States' surrender of immunity from suits by sister States [is] plausible [due to] the mutuality of that concession. There is no such mutuality with Indian tribes." This is because "tribes were not at the Constitutional Convention."[9]

Therefore, both state and tribal immunity originate in federal law. Each is subject only to the superior sovereignty of the United States. Tribes and states are each immune from suit by the

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[5] *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001)
[6] *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000)
[7] *Florida Prepaid Postsecondary Ed. Expense Board v. College Savings Bank*, 527 U.S. 627 (1999)
[8] *Alden v. Maine*, 527 U.S. 706 (1999)
[9] *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751, 756 (1998)

other, except as Congress may direct. Even such Congressional direction regarding state immunity is subject to the additional requirements of *Kimel, supra.*

Thus, it is entirely unremarkable in the above federal system of government that each kind of domestic sovereign, state and tribal, continues to enjoy immunity from suit by the other. As in *Blatchford, Potawatomi, and Kiowa, supra,* even if either a state sovereign or a tribal sovereign may have a substantive right against the other, each will be without a judicial remedy as against the other unless Congress has effectively waived the immunity of the other sovereign, or the other sovereign expressly and unequivocally waives its immunity.

C. As do other states and tribes regarding an immune sovereign, the FPPC has an alternative to direct judicial enforcement.

Potawatomi is particularly instructive in that it describes how a state, while possessing a substantive right against a tribe, but lacking the means to overcome tribal sovereign immunity to enforce that right[10] by direct legal action against the tribe, may seek compliance by the tribe with the state statute in other ways.

> In view of our conclusion with respect to sovereign immunity of the Tribe from suit by the State, Oklahoma complains that, in effect, decisions such as *Moe* and *Colville* give them a right without any remedy. There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable in damages for actions brought by the State. See *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). And under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation [cit.om.], or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores. [cit.om.]. States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax. [cit.om.]

[10] As will be noted below, the Tribe denies that the FPPC has such a substantive right in this case, or that it has engaged in off-reservation conduct. However, for this portion of this brief, the Tribe will made this assumption.

> And if Oklahoma and other States similarly situated find that none of these alternatives produce the revenues to which they are entitled, they may of course seek appropriate legislation from Congress.
>
> *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991)

In the present case, the FPPC has the same kinds of alternatives as did the Oklahoma state agency in *Potawatomi* and as did the individual or tribal plaintiffs in *Seminole, Garrett, Kimel, Florida Prepaid,* and *Alden, supra.* Instead of direct enforcement through legal action, the FPPC could approach the Tribe on a government-to-government basis to negotiate an agreement that would take the place of strict submission to the statute. Such an agreement with the Tribe could call for a degree of compliance that would satisfy the needs of the FPPC by the FPPC receiving *all* the information required of contributors and employers of lobbyists, in a format and on a timetable similar, but not necessarily identical in all particulars, to those specified in the Act. Alternatively, despite the FPPC's declarations that such compliance would be cumbersome, the FPPC could fully satisfy its needs by the reports which it already receives from the recipients and lobbyists, collating that data into a database that could be readily searched to produce the equivalent of a report from a donor or employer of lobbyists.

As noted in the declaration of Richard M. Milanovich, the Tribe's Chairman, such a government-to-government relationship between the State of California and the Tribe already exists in the tribal-state compact between these two governments, executed by the State's Governor and the Tribe's Chairman in 1999.[11] This compact covers the important subject of the regulation of gaming and could easily be the model for a similar respectful agreement between the Tribe and the FPPC. Only the FPPC's stubborn insistence on regulation on precisely its terms stands in the way of such an agreement. The preamble of this compact recites, at p. 1 that

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[11] A copy of the full text of this compact is attached to a separate request for judicial notice.

> This Tribal-State Gaming Compact is entered into on a government-to-government basis by and between the Agua Caliente Band of Cahuilla Indians, a federally-recognized sovereign Indian tribe (hereinafter "Tribe") and the State of California, a sovereign State of the United States (hereinafter "State") pursuant to . . .

The prospect of the FPPC achieving its goals by government-to-government agreement, rather than attempting to subject the Tribe to direct regulation, is not illusory. The Tribe has already entered into numerous such agreements on a government-to-government basis with many other governments at the federal, state, county, and municipal levels. Each such agreement provides to the non-Indian government benefits which that government could not otherwise achieve directly. See Chairman Milanovich's declaration, in which he describes 15 such agreements which are already in effect. In his declaration, Chairman Milanovich also states the Tribe's willingness to discuss a similar relationship with the FPPC, which previously has been unwilling to discuss any relationship other than complete submission.

Thus, the FPPC is simply wrong in asserting that, if it has a substantive right to require the Tribe to obey the Political Reform Act, it must somehow also have a waiver of the Tribe's immunity to enforce that right by direct suit against the Tribe in this Court. The U.S. Supreme Court has rejected that claim by both tribal and state sovereigns as against the other. Even if the FPPC has such a right, it must be enforced not by unilateral suit, but by bilateral agreement, or otherwise, as the U.S. Supreme Court suggested to Oklahoma in *Potawatomi, supra.*

III. NO MATTER HOW COMPELLING A STATE AGENCY MAY THINK ITS INTEREST, THERE IS STILL NO BALANCING OF INTERESTS REGARDING A TRIBE'S CLAIM OF SOVEREIGN IMMUNITY.

Much of the FPPC's argument is premised on its claim that its interest in compelling the Tribe to provide the information called for by the Political Reform Act in precisely the form and according to the exact timetable prescribed by the Act is so compelling that this interest must

somehow overcome whatever interest the Tribe may have. This is a false premise. As noted in detail in part V, pp. 6-7, of the Tribe's opening brief, a claim of tribal sovereign immunity does not involve any balancing of interests. Recognition of the immunity, if it exists, is mandatory, not discretionary, and does not depend on the equities of any particular situation. Such claims are not resolved, as the FPPC urges, on a case-by-case basis. Instead, they are pure questions of law, determined irrespective of and prior to the merits of the claim, as was held in the cases cited in part V of, and throughout, the Tribe's opening brief.[12]

The FPPC does not directly dispute that resolution of a claim of tribal sovereign immunity does not balance interests. However, the FPPC sets forth its interests and claims that applying the Political Reform Act to the Tribe in this enforcement action "infringes on no legitimate sovereign interest of the tribe," (Opp., p. 11, lines 10-11) thereby implying that such balancing of interests is proper. To this non-response to the cases prohibiting balancing, followed by attempted balancing, the Tribe makes the following responses.

A. The FPPC confuses tribal sovereign authority with tribal sovereign immunity.

In analyzing claims of general tribal sovereign authority, usually involving the activities of non-Indians on a reservation, the courts routinely use a balancing of interests test:

> We have balanced federal, state, and tribal interests in diverse contexts, notably, in assessing state regulation that does not involve taxation, see, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-217, 107 S.Ct. 1083, 1091-1092, 94 L.Ed.2d 244 (1987) (balancing interests affected by State's attempt

[12] The U.S. Supreme Court granted certiorari in *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549 (9th Cir., 2002) on December 2, 2002, after the Tribe's opening brief was filed. However, that action does not disturb the precedential value of the opinion of the Ninth Circuit until and unless it is eventually vacated or reversed. Furthermore, the Tribe asks the Court to recall that, despite the FPPC's extensive quotation from the dissents in *Potawatomi* and *Kiowa*, the majority opinion controls, not the dissent. ". . . Justice Stevens' comments in . . . *Potawatomi* are not binding on the lower courts." *Elliott v. Capital, etc.*, 870 F.Supp. 733, 735 (E.D.Texas, 1994).

> to regulate on-reservation high-stakes bingo operation), and state attempts to compel Indians to collect and remit taxes actually imposed on non-Indians, see, e.g., *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation,* 425 U.S.463, 483, 96 S.Ct. 1634, 1646, 48 L.Ed.2d 96 (1976) (balancing interests affected by State's attempt to require tribal sellers to collect cigarette tax on non-Indians . . .).
>
> *Oklahoma Tax Commission v. Chichasaw Nation,* 515 U.S. 450, 458 (1995)

Such balancing routinely occurs in other contexts in which the issue is regulation of the on-reservation conduct of individuals or non-Indians.[13] See, e.g, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-145 (1980) ("More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. The inquiry has called for a particularized inquiry into the status of the state, federal, and tribal interests at stake ."). See also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) in which federal and tribal interests in tribal regulation of on-reservation hunting by non-Indians outweighed state interests in state licensing of such hunters, leading to a finding of federal preemption of the state licensing requirement.

Such weighing of interests occurs *only* concerning tribal sovereign authority regarding such regulatory areas, usually involving non-Indians. In those cases, it is entirely proper to balance federal, state, and tribal interests, and to consider whether there exists a tradition of tribal regulation of the subject in question. However, the analysis is entirely different regarding the completely separate question of whether a state may overcome a tribal defendant's sovereign immunity in an action to impose a state regulatory scheme directly on a tribe. As recently as November of 2002 the Ninth Circuit has held:

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[13] In most such cases, only individual Indians not claiming tribal sovereign immunity are defendants, often only individual non-Indians. In *every* such case in which a tribe is a party, the tribe is the plaintiff, so there is no issue of overcoming its sovereign immunity as a defendant.

> In pressing this argument, he [Dawavendewa, the plaintiff] correctly notes . . . that "the inherent sovereign powers of an Indian Tribe do not extend to the activities of non-members of the Tribe."
>
> From this solid precipice, however, Dawavendewa plummets to the assertion that the [Navajo] Nation cannot assert tribal sovereign immunity against Dawavendewa's claims. **We disagree. Indeed, with this conclusion, Dawavendewa appears to confuse the fundamental principles of tribal sovereign authority and tribal sovereign immunity.** The cases Dawavendewa cites address only the extent to which a tribe may exercise jurisdiction over those who are non-members, i.e., tribal sovereign authority. These cases do not address the concept at issue here—our authority and the extent of our jurisdiction over Indian Tribes, i.e. tribal sovereign immunity.
>
> In the case at hand, the only issue before us is whether the [Navajo] Nation enjoys sovereign immunity from suit. We hold that it does, and accordingly, it cannot be joined nor can tribal officials be joined in its stead.
>
> *Dawavendewa v. Salt River Project, etc.*,
> 276 F.3d 1150, 1161 (9th Cir., 2002, emphasis added).

This distinction between the test used to determine whether a tribe's sovereign authority allows state jurisdiction to regulate the on-reservation conduct of non-Indians, and the test used to determine if a state may sue a tribe on that issue, is perhaps at its clearest regarding on-reservation hunting by non-Indians. For the tribal sovereign authority issue, the U.S. Supreme Court expressly balanced the tribal, state, and federal interests in *New Mexico, supra*, 462 U.S. at 333-344. However, when California attempted to sue the Quechan Tribe on the very same issue, no balancing of interests was even considered. On the contrary, the Ninth Circuit held:

> California concedes that Indian tribes are immune from suit unless Congress has expressly consented to that suit. [cit.om.] Nonetheless, California goes on to make two major arguments why the immunity of the Tribe should not bar the present suit. These are: (1) an enumeration of the distinguishing features of the present case which allegedly are a sufficient basis for the court to refuse to invoke the doctrine of sovereign immunity . . .
>
> While the several distinguishing features of this case may make it unique, . . . they cannot justify a refusal, by this court, to recognize the Tribe's claim of sovereign immunity. The fact that it is the State which has initiated suit is irrelevant insofar as the

> Tribe's sovereign immunity is concerned. [cit.om.] Although we may sympathize with California's need to resolve the extent of its regulatory power, the "desirability for complete settlement of all issues . . . must. . . yield to the principle of immunity." [cit.om.]
>
> Sovereign immunity involves a right which courts have no choice, in the absence of a waiver but to recognize. It is not a remedy, as suggested by California's argument, the application of which is within the discretion of the court.
>
> *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir., 1979)

The FPPC's frequent citation to *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)[14] is both wrong and misleading. In *Cabazon*, the tribes were the *plaintiffs*, so there was no issue of their sovereign immunity as defendants. Instead, the quoted language by the U.S. Supreme Court pertains only to state regulatory authority in general, and *not* to enforcing such jurisdiction by suit against a tribe, as the U.S. Supreme Court prohibited in *Potawatomi*.

Therefore, when the FPPC invites the Court to balance interests in this case, the FPPC simply defies, without distinguishing, the holdings noted above and in part V of the Tribe's opening brief. All these authorities either (1) explicitly hold that there is no balancing of interests, no case-by-case analysis, no discretion, and no consideration of the nature of the merits of the case, or (2) recognize that "[E]ven assuming jurisdiction over Cabazon Bingo, that fact would not overcome the defense of sovereign immunity."[15] The FPPC has cited no case where such balancing occurs on a direct claim of tribal sovereign immunity, because there is none.

B. Even if the FPPC's interest is viewed as "compelling," such an interest does not prevail against tribal sovereign immunity.

The FPPC provides a litany of cases to the effect that its interest in advancing the goals of the Political Reform Act is "compelling." Even if the FPPC's interests are regarded as

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[14] "the United States Supreme Court has not established an inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent." *California v. Cabazon Band of Mission Indians*, 480 U.S. a 214-15." Opp. p. 16, lines 20-23.

[15] *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632, 643 (1999)

compelling in other contexts, such interests still have never prevailed as against a tribe's interest in maintaining its immunity from suit without its consent or that of Congress.

For example, consider another state interest that is also regarded as compelling, that of a

which prohibits federal courts from becoming involved in such disputes in most cases:

> The district courts shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

This limitation on federal court jurisdiction flows directly from the importance attached to allowing the states to administer their tax systems without federal interference:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.
>
> *National Private Truck Council, Inc. v. Oklahoma Tax Commission,* 515 U.S. 582, 586 (1995); quoting *Dows v. City of Chicago,* 78 U.S. (11 Wall.) 108, 110 (1871)

This state interest regarding its tax system "is sufficiently weighty to allow States to withhold predeprivation relief for allegedly unlawful tax assessments, providing postdeprivation relief only"[16], based on an analysis that a postdeprivation hearing satisfies due process in such cases:

> To protect [a state] government's exceedingly strong interest in financial stability in this context, we have long held that a State may employ various financial sanctions and summary remedies, such as distress sales, in order to encourage taxpayers to make timely payments prior to resolution of any dispute regarding the validity of the tax assessment.
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> *McKesson v. Division of Alcoholic Beverages,* 496 U.S. 18, 37 (1990)

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[16] *McKesson v. Division of Alcoholic Beverages,* 496 U.S. 18, 50 (1990)

The U.S. Supreme Court has also explicitly described this state interest as "compelling" in *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 527 (1981).

If the FPPC's argument that the "compelling" nature of the state interest at stake here Tribe's sovereign immunity in that state's counterclaim for taxes in *Potawatomi, supra.* However, the U.S. Supreme Court did not even consider the equally "compelling" nature of the state interest in taxation in *Potawatomi, supra*, because the nature of a plaintiff's interest is irrelevant to a tribe's immunity.

IV. THE FPPC'S CLAIM OF WAIVER BY PARTICIPATION IN THE POLITICAL PROCESS IS SIMPLY WRONG.

The FPPC claims that by supposedly injecting itself into California's political process, the Tribe has somehow waived its immunity for this enforcement action. The FPPC is wrong.

A. The U.S. Supreme Court has already rejected the FPPC's claim.

In *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986), the U.S. Supreme Court considered the effect of a state statute that "require[d] that the [Ft. Berthold] Tribe consent to suit in *all* civil causes of action before it may gain access to state court as a plaintiff." That Court held this statute preempted because it

> serves to defeat the Tribe's federally conferred immunity from suit. The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance. . . . tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.
>
> *Id.*, 476 U.S. at 890-891

So, too, here. The Tribe has a right to participate in the political process by making contributions, engaging lobbyists, etc. Conditioning that right on submission to the Political

Reform Act intrudes on tribal sovereignty by prescribing the precise terms on which political activity will occur, rather than allowing the Tribe to formulate those terms by agreement with the FPPC on a government-to-government basis. Furthermore, *Ft. Berthold, supra,* 476 U.S. at 893, also refutes the FPPC's can't-have-it-both-ways argument:

> The perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances, much in the same way as the perceived inequity of permitting the United States or North Dakota to sue in cases where they could not be sued as defendants because of their sovereign immunity also must be accepted.

Therefore, by participating in the California political process, the Tribe has not waived its sovereign immunity as to this action, any more than the Ft. Berthold Tribe waived its immunity as a defendant by becoming a plaintiff in a North Dakota state court. Because "tribal sovereignty is dependent on and subordinate to, only the Federal Government, not the States" (*Cabazon, supra*, 480 U.S. at 207), a state may not condition a tribe's federally-based sovereign immunity on compliance with a state statute that diminishes that sovereign immunity.

B. The Tribe has not expressly and unequivocally waived its immunity.

At part VII, p. 8, of its opening brief, the Tribe sets forth the standard used by both the federal and state courts to determine if a tribe has waived its sovereign immunity: "It is settled that a waiver of [tribal] sovereign immunity '"cannot be implied but must be unequivocally expressed."[17] To this assertion the FPPC makes no reply, thereby conceding the point. Instead, the FPPC posits that by "injecting" itself into the political process, this "injection" waived the

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[17] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Middletown Rancheria of Pomo Indians v. Workers' Compensation Appeals Board*, 60 Cal.App.4th 1340, 1347 (1998); *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council*, 170 Cal.App.3rd 489, 498 (1985)

Tribe's immunity, but without explaining how this "injection" is an "unequivocally expressed" intent to waive. To this implicit claim of waiver, the Tribe makes the following responses.

First, every action which the Tribe itself took (e.g., deciding to make contributions or to

Indian Reservation. See declarations of Richard M. Milanovich and Max Ross. Even though the recipients of the checks received them and the lobbyists lobbied off the reservation, those recipients and lobbyists fully complied with the Act, and the FPPC does not claim otherwise. Therefore, *all* this "injection" occurred on the Agua Caliente Indian Reservation, where the presumption against a waiver of tribal sovereign immunity is at its strongest.[18]

Second, making contributions and engaging lobbyists comes nowhere near the standard of unequivocality needed for an effective waiver. Among the actions by tribes that have been held *not* to constitute such an unequivocal waiver, even regarding the very activity in question, are: engaging in commercial activities,[19] filing a complaint,[20] not answering a complaint,[21] engaging in gaming,[22] accepting service of process,[23] agreeing to obey Title VII,[24] inserting a choice of law provision in a contract,[25] accepting federal funds,[26] assisting in drafting and enacting legislation,[27] inserting a liquidated damages clause in a contract, [28] or participating in an

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[18] *Demontiney v. U.S. Dept. of the Interior*, 255 F.3d 801, 811 (9th Cir., 2001)
[19] *Kiowa, supra*, 523 U.S. at 760 (1998)
[20] *Potawatomi, supra*, 498 U.S. at 909 (1991)
[21] *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir., 2000)
[22] *Tamiami Partners, Inc. v. Miccousukee Tribe*, 63 F.3d 1030, 1048 (11th Cir., 1995)
[23] *Snow v. Quinault Indian Tribe*, 709 F.2d 1319, 1322-1323 (9th Cir., 1983)
[24] *Hagen, supra*, 205 F.3d at 1044, n.2 (8th Cir., 2000)
[25] *American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir., 1985)
[26] *Guthrie v. Circle of Life*, 176 F.Supp.2d 919, 924 (D,Minn., 2001)
[27] *Native American Mohigans v. U.S.*, 184 F.Supp.2d 198, 214 (D.Conn., 2002)

administrative proceeding.[29] Making contributions and engaging lobbyists falls so far short of an unequivocal waiver, that the FPPC does not explicitly claim them as such an unequivocal waiver.

The closest that the FPPC comes to identifying precisely what the Congressional or various off-reservation activities. However, *Red Lake* is irrelevant to the question of tribal sovereign immunity because the political committee in that case was not a tribe, and did not claim immunity. That committee's actions were subject to state regulation by suit, not because they were a waiver, but because the committee had and claimed no immunity in the first place.

Presumably, the Minnesota courts[30] would not follow *Red Lake* if a tribe were involved. In *Diver v. Peterson*, 524 N.W.2d 288 (1994) the Minnesota Court of Appeals held that a tribal official enjoyed immunity regarding his off-reservation publication of defamatory statements, finding that "The express waiver requirement applies 'irrespective of the nature of the lawsuit.'" *Id.*, at 290. Tellingly, the Minnesota Court of Appeals also held (*Id.*, at 291) that

> However, tribal immunity is jurisdictional, the purpose of which is to promote the overriding federal policy of tribal self-government. Therefore, tribal sovereign immunity applies to tribal officials acting in their official capacity, **even where one element of a claim occurred outside the reservation.** [emphasis added]

V. THIS CASE IMPLICATES NO TENTH AMENDMENT INTERESTS.

The subject of the Tenth Amendment is the allocation of power between the United States and the states. Federal powers are subject to certain limits inherent in state sovereignty

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[28] *Tribal Smokeshop v. Alabama-Coushatta Tribes*, 72 F.Supp.2d 717, 719 (E.D.Texas, 1999)
[29] *Calvello v. Yankton Sioux Tribe*, 899 F.Supp. 431, 438 (D.S.D., 1995)
[30] Equally unpersuasive is *Shakopee Mdewakanton Sioux Community v. Minnesota Campaign Finance & Public Disclosure Board*, 586 N.W.2d 406 (Minn.Ct.App., 1998). There the tribe was the plaintiff, so there was no issue as to its immunity as a defendant.

reflected elsewhere in the Constitution. *Gregory v. Ashcroft*, 501 U.S. 452, 468-470 (1991). The FPPC claims (Opp., pp. 12-13) that this case implicates California's reserved powers over its elections under the Tenth Amendment. How? Tribal immunity originates from the pre-

144 (1982). There is no Congressional action here at all to violate the Tenth Amendment, which simply does not address power as between states and tribes, or the immunity of tribes. With no mention of the Tenth Amendment, the Fourth District has recently held that

> Indian tribes are domestic dependent nations that exercise inherent sovereign authority over their members and territories. As an aspect of this sovereign immunity, suits against tribes are barred in the absence of an unequivocally expressed waiver by the tribe or abrogation by Congress.
>
> *Warburton v. Superior Court*, ___ Cal.App.4th ___, ___; 2002 LABJDAR 13275, 13278 (Nov. 27, 2002)

Even if the doctrine of tribal sovereign immunity did somehow implicate Tenth Amendment interests, there would still be no violation here. Such a violation occurs only when a federal action "compels the states to regulate private parties . . . [or] regulates the states directly." *Blount v. Securities & Exchange Commission*, 61 F.3d 938, 949 (D.C.Cir., 1995). *Blount* is especially instructive here because it upheld a federal regulation limiting political contributions by certain securities traders. There is no federal action here to violate the Tenth Amendment.

VI. THE FPPC'S SOURCE FOR RELIEF IS CONGRESS, NOT THIS COURT.

In both *Potawatomi, supra,* 498 U.S. at 510 (1991), and *Kiowa, supra,* 523 U.S. at 758-760 (1998), the U.S. Supreme Court has expressly stated that only Congress should change the doctrine of tribal sovereign immunity.[31] In response, Congress considered several bills,

[31] ". . . Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. . . . we decline to revisit our case law and choose to defer to Congress." *Kiowa, supra,* 523 U.S. at 759-760.

conducted hearings, and made a change in the doctrine. By §2 of its Act of March 14, 2000, 114 Stat. 46, 25 U.S.C. §81, Congress designated a category of contracts with tribes that will be invalid unless approved by the Secretary of the Interior, and specified that the Secretary will not approve any such contract unless it puts third parties on notice of the doctrine or "includes an express waiver of the right of the Indian tribe to assert sovereign immunity as a defense . . ." 25 U.S.C. §81(d)(2)(C). This is the policy choice made by Congress. In light of the U.S. Supreme Court's insistence on deference to Congress on this issue, this Court should do the same.

VII. ISSUE PRECLUSION DOES GOVERN THIS MOTION.

Even though the Court of Appeals reversed the judgment as to the Community Redevelopment Agency in *People ex rel. Lungren v. Community Redevelopment Agency*, 56 Cal.App.4th 868 (1997), that reversal pertained to the judgment as to that defendant only because only that defendant took an appeal. The same judgment also pertained to the Tribe and, as to the Tribe, there was no appeal. It does not matter whether the Tribe was indispensable or not in that case. What matters is the judgment from which no appeal was taken as to the Tribe. That judgment has issue preclusive effect as to the Tribe. Even though the merits of the two cases are different, the issue which is now precluded, whether the People or those in privity with the People may overcome the Tribe's sovereign immunity, is precisely the same, irrespective of the merits of the claims. That unappealed judgment, as to the Tribe, on *that* issue, is preclusive now.

The public interest exception found in *Kopp v. FPPC*, 11 Cal.4th 607, 621-622 (1995) is based on *City of Sacramento v. California*, 50 Cal.3d 51, 64-65 (1990) where the determining factors were that the State could lose millions of dollars, and no party other than the State would have standing to relitigate the issue in a non-precluded context. That is not he case here. The FPPC will pay nothing if the Tribe's motion is granted. Any party other than those in privity

with the People may relitigate the immunity issue. Furthermore, all the cases recognizing this exception are based on §70 of the Restatement of Judgments[32], which rests on *U.S. v. Stone & Downer*, 274 U.S. 225, 236 (1927), in which preclusion was held not warranted due to the unusual nature of customs adjudications. No such unusual circumstance is present in this case. The normal rule of preclusion does apply, rather than the exception.

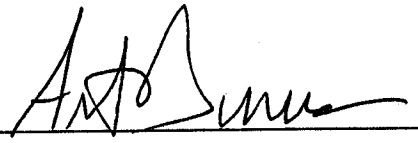
CONCLUSION

Strain as it might, the FPPC cannot escape the fact that neither Congress nor the Tribe has explicitly and unequivocally waived the Tribe's immunity in this case. As *Potawatomi* and *Kiowa* hold, that is the end of the inquiry on the immunity issue. Unlike the general regulatory context in which there may be a balancing of interests, there is never a balancing of interests or consideration of the nature of a plaintiff's interest, even if otherwise a compelling one, on the immunity issue, as in *Potawatomi*. The federal system often gives both state and tribal plaintiffs rights as against the other, but no means of judicial enforcement. The FPPC's remedy, as in *Potawatomi*, is a government-to-government agreement with the Tribe, or recourse to Congress. The Tribe is willing to negotiate such an agreement, but it will not surrender to pure regulation.

For the above reasons, and those in the Tribe's opening brief, the Agua Caliente Band respectfully urges the Court to follow the law and grant its motion to quash, leaving it and the FPPC to deal on a government-to-government basis directly with each other, as in *Potawatomi*.

Dated: December 27, 2002

Respectfully submitted,



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the Agua Caliente Band of Cahuilla Indians

[32] See *Louis Stores, Inc. v. Dept. of Alcoholic Beverage Control*, 57 Cal.App.2d 749, 758 (1962)